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No. _____

In The

Supreme Court of the United States

HUEY P. HARRIS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals, Ninth District Of Texas
At Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the conviction herein violate Federal standards regarding sufficiency of the evidence on the basis that the evidence failed to establish the *actus reus* of the offense, thereby deciding an important question of federal law in a way that conflicts with relevant decisions of this Court?

(2) Does the decision of the Court of Appeals deny petitioner due process of law by failing to adequately review the appellate complaint concerning factual sufficiency of the evidence and apply Texas law to reverse the conviction?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Huey P. Harris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, holding that the evidence was sufficient to support the conviction of possession of a controlled substance and failing to adequately review the issue of factual sufficiency and apply Texas law.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont, Texas, is published as *Harris v. State*, 32 S.W.3d 926 (Tex.App. – Beaumont 2000), and appears in Appendix A to this petition as *Huey P. Harris v. The State of Texas*, #09-99-339-CR, December 13, 2000.

This petition is timely filed in that it is filed seeking review of a lower state court judgment subject to discretionary review by the state court of last resort, the Texas Court of Criminal Appeals, Austin, Texas, within 90 days after the entry of the order denying discretionary review. The Texas Court of Criminal Appeals refused discretionary review on April 18, 2001. A copy of the order denying discretionary review by the Texas Court of Criminal Appeals appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals, Ninth District of Texas at Beaumont's opinion in this matter was filed on December 13, 2000. The Texas Court of Criminal Appeals refused discretionary review on April 18, 2001. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257, and pursuant to the U.S. Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution is involved to the extent that the decision of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, denied petitioner due process of law.

The statute upon which petitioner was convicted is Texas Penal Code, § 31.03.

STATEMENT OF THE CASE

This petition involves a conviction arising from a prosecution in the 88th District Court of Hardin County, Texas at Kountze, Texas, of the felony offense of theft. Petitioner raised the federal questions involved before the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in the original Brief for Appellant timely filed with the Court of Appeals on April 20, 2000, by pointing out by specific citations references in the trial record and the various opinions requiring an acquittal based upon issues involving constitutional dimensions.

Petitioner's original brief complained of the insufficiency of the evidence and set out the original complaints warranting a reversal of the conviction. Likewise, petitioner again raised the constitutional issues before the Texas Court of Criminal Appeals, but review was summarily refused as indicated by the attached Appendix B.

Petitioner, Huey P. Harris, contends that the evidence was insufficient to support the conviction of theft and that the Court of Appeals denied him due process by failing to adequately review the issue of the factual insufficiency of the evidence and apply Texas law. While a complete review of the evidence is necessary in order to evaluate this issue should this Court grant a writ of certiorari, petitioner details the pertinent evidence in the Reasons for Granting the Writ hereinbelow.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the Court of Appeals, Ninth District of Texas at Beaumont, Texas, has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. The Court of Appeals issued an opinion that renders the decisions of this Court concerning insufficiency of the evidence to be of no consequence. Additionally, by failing to even properly review the factual insufficiency of the evidence and apply Texas law, the Court denied petitioner due process.

> (I) *Corpus delicti*. "The body of a crime. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has

been committed." *Black's Law Dictionary, 4th Ed.*, 1968.

Petitioner contends that the evidence of theft is remarkably underwhelming. The State simply failed to prove the *corpus delicti*. In viewing the evidence in the light most favorable to the verdict as required by law, there was insufficient evidence to establish that petitioner committed the act of theft as alleged in the indictment. Petitioner was indicted by a Hardin County grand jury for the offense of felony theft, which indictment alleged that he unlawfully appropriated timber owned by Texaco on or about October 21, 1996, in Hardin County, Texas. RR.IV-15; CR.I-3. Petitioner entered a plea of not guilty, and trial was to a jury. RR.IV-16. He was convicted by the jury and received a 2 year term of imprisonment probated over 5 years and a $10,000.00 fine.

On direct appeal to the Ninth Court of Appeals, the legal and factual sufficiency of the evidence was challenged and is summarized as follows. A Hardin County sheriff's deputy, Gary Spears, testified that he went to a location near Hatcher Road in Hardin County, Texas, to investigate an alleged timber theft on property owned by Texaco. RR.IV-23. On October 23, 1996, he went to the location and met with the logging contractor, Charles MacGinnis and petitioner, Huey Harris. In the course of the conversation, petitioner produced a deed indicating that he owned certain property in that general area and the witness could not determine the exact location from which the timber was being harvested from the deeds or maps produced. RR.IV-24-25. He testified that he even met with petitioner at the Hardin County courthouse at which time petitioner showed him the deeds indicating

his ownership, and that petitioner claimed ownership of the property. RR.IV-25-26. He repeatedly testified that petitioner stated that he was the owner and he was cutting his own timber, even producing a deed. RR.IV-30. Billy Tomlinson testified that he developed certain maps concerning the property. RR.IV-33. He accompanied a Texaco agent out to the land and observed the logger MacGinnis in the logging operation, as well as petitioner on the following day. RR.IV-36-38. The State elicited further testimony that petitioner believed that it was his land, and insisted that he was cutting his own timber. RR.IV-39-40. The witness testified that petitioner did not seem concerned about the Texaco agent claiming ownership to the land, and apparently never indicated he believed he was doing anything wrong. RR.IV-47. While the Texaco agent and Tomlinson could not even find one of the survey monuments, Tomlinson testified that petitioner himself showed them where the marker was because they could not find it. RR.IV-44-47. Petitioner had even informed Tomlinson that he had had the property surveyed, and Tomlinson observed flagging in the area. RR.IV-53. The Texaco agent, Douglas Ables, thereafter testified that he was the land representative for Texaco and that he began to investigate as to whether or not the timber operation was under way on Texaco property. RR.IV-55-56. He established ownership on certain tracts of property near the area being logged as belonging to Texaco. RR.IV-58-62. He indicated that MacGinnis had told him that he was supposed to cut a certain marked area that was petitioner's land. RR.IV-65. Ables testified that he had the land surveyed during the logging operation in order to determine the property lines. RR.IV-71-73.

Tomlinson had previously testified that Ables did not know exactly where the property was, which is why he had accompanied him to the site. RR.IV-50-51. In attempting to describe the location through pictures introduced, it was obvious that even the witness was confused as to the location of the Texaco property. RR.IV-79. Ables testified that a survey was actually necessary in order to locate the subject property. RR.IV-88, 118. He additionally testified that some of the timber on Texaco land had been previously cut in a different incident. RR.IV-90. He further testified that petitioner had attempted to purchase the land owned by Texaco in September of 1996, indicating that petitioner had researched the area to determine ownership of the property. RR.IV-93-95. He testified that, although he never saw MacGinnis or petitioner cutting timber, he could not determine the logging operation had cut any timber on Texaco property until after he had surveyed it, indicating that the lines were never defined until a week later by his surveyor. RR.IV-112. When asked if he could testify that petitioner cut the timber, he replied that the only thing he could say was that the tract of land had been recently cut and petitioner's operation was hauling timber there. RR.IV-113. This witness additionally repeatedly indicated that petitioner at all times asserted that he was cutting his own timber, and that the Texaco timber was previously cut, demonstrating petitioner's belief that he was not cutting Texaco timber. RR.IV-97. Upon cross-examination, the witness indicated that it was difficult to determine the property lines, and to do so required a considerable amount of work. RR.IV-117-119. He additionally indicated that a portion of

the Texaco property had previously been cut which was not involved in this case. RR.IV-121. The State thereafter called logging contractor Charles MacGinnis who testified that he was hired by petitioner to cut petitioner's timber pursuant to a contract. RR.IV-130. He testified that petitioner showed him the land to be cut, including flagging part of it. RR.IV-132-134. MacGinnis testified that petitioner indicated for him to cut an area marked by yellow on a map, a point later disputed by petitioner. RR.IV-135. After Ables had visited the land and indicated that there was a possibility that MacGinnis was cutting on Texaco property, he contacted petitioner. Thereafter petitioner met with the previous witnesses and instructed MacGinnis that Texaco did have some lots in there but the timber was previously cut on the Texaco lots. RR.IV-136. He testified that petitioner had even told Texaco that their timber had already been cut, and in fact some of the area marked in yellow on the subject map had already been cut, further indicating petitioner's belief that he was not trespassing on Texaco property. RR.IV-137-138. MacGinnis testified that the operation started and stopped several times while Texaco people and petitioner were in discussion over ownership of the property. RR.IV-138-142. After each discussion, petitioner instructed MacGinnis to continue cutting, further demonstrating petitioner's belief that he was operating upon his own property. RR.IV-140-142. He testified that after receiving payment for the loads of timber, including that which may have been mistakenly cut from Texaco property, he remitted petitioner's portion to him in the amount of $10,897.07 and $17,688.41. RR.IV-144-145.

When asked by the prosecutor if he could actually state to the jury whether or not he knew he actually cut timber off the Texaco tracts, he indicated that there was some timber cut "in the backside over here against the government's property", but he did not know where that was located. RR.IV-148. He further testified that there was no conspiracy between him and petitioner and the cutter to do this. RR.IV-151. Upon cross-examination, MacGinnis indicated that he had previously signed a statement indicating that petitioner and the sawman Gary Marshall had walked the property and the area to be cut was marked with red colored ribbon. RR.IV-158. He indicated that every time something came up, petitioner and Marshall would walk the property. RR.IV-158. Again on redirect examination, the witness indicated that he "guessed" that he cut some of the Texaco timber, according to the maps, but that he was not a surveyor. RR.IV-169. He indicated that while petitioner claimed that he owned the land and timber, apparently it turned out that petitioner was incorrect. RR.IV-169-170. The State thereafter called Robert Harper who had done a timber survey and estimated the amount of timber which the State contended had been cut off the Texaco property. RR.IV-175-179. He indicated that according to his calculations 7.6 acres of Texaco property had been cut, with an estimated value of $5,634.11. RR.IV-181. The State thereafter called Kenneth Parker who surveyed the portion of the Texaco area the State claimed had been cut. RR.IV-196-197. The State thereafter rested. RR.IV-203.

Petitioner called Samuel Ashworth, a forester and timber businessman, in order to introduce a photograph of the subject area. RR.IV-205-206. Said exhibit introduced as Defendant's Exhibit 2 indicated the portion of Texaco

property that was previously cut. RR.IV-210. While he did not dispute the State witness Harper's testimony, he did indicate the area that was actually cut was in a different location than that demonstrated by the State's map. RR.IV-214. Virgil Hussey testified that he had experience in estimating timber, and was hired by petitioner on March 14, 1996, to flag the lines bounding petitioner's property. RR.IV-216. He indicated that he flagged the property owned by petitioner prior to the timber cut. RR.IV-217-219. He indicated that he returned to the property some months later after he initially flagged it to reconfirm the flags because petitioner was going to have his property cut. RR.IV-220. He testified that when flagging the property, he saw evidence of petitioner Huey Harris' surveyor, which helped him place his markers. RR.IV-223. Petitioner thereafter called Tim Parker, a forestry consultant, who also was experienced in appraising timber. RR.IV-225. He confirmed the value of the timber Texaco claimed to be $5,634.11, and described the area that had been cut. RR.IV-226-229. He also testified that the property had been flagged twice indicating that it had been flagged when it was cut, confirming that petitioner Huey Harris had actually engaged Hussey to flag his own property. RR.IV-230. He also testified that, based upon defense exhibits introduced without objection, he determined 67 loads of timber were actually sold off of this cutting. RR.IV-232. He testified that petitioner should have been paid $37,825.10, but in fact he was paid $28, 585.48, indicating that petitioner was apparently not paid for 8 missing loads. RR.IV-233-234. Parker additionally testified as to the reasons that a logger can cross a line inadvertently, and he had seen that happen in the

past. RR.IV-242-244. He further testified that the amount of loads of timber which would have come off of the yellow area marked on State's Exhibit 7 would have been 7-9 loads, approximately the same amount for which petitioner was never paid by the State's witness MacGinnis. RR.V-5-7. Upon cross-examination the prosecutor elicited testimony indicating that MacGinnis could have had another truck sell timber at the same mill from a different tract, which could account for the 8 load discrepancy. RR.V-9. That theory to explain the missing 8 loads for which petitioner was never paid was not supported by the previous testimony by MacGinnis, who had previously testified that this was the only job he was working for that 2 week period. RR.V-152. Parker described the flagging that Hussey had put up marking the property prior to the cut. RR.V-10-11. Petitioner thereafter called Gary Marshall, who is the actual man in charge of the crew that cut the timber. RR.V-12. He testified, and petitioner additionally introduced documentary evidence, indicating that 67 loads of timber were delivered from this particular location. RR.V-13,18. He testified that MacGinnis had asked him to meet petitioner to look at the property prior to the timber operation, which in fact he did. RR.V-18. He testified that petitioner showed him some of the property lines and that they walked a portion of the property. RR.V-19. He testified that while they did not walk around the entire property, the portions they walked had flagged lines marking the property lines. RR.V-19. He described in detail the flagged lines on the different boundary lines. RR.V-20. He testified that he did not recall whether or not the map he received from petitioner which he later delivered to MacGinnis had

been marked in yellow. RR.V-21. He further testified that petitioner told him that Texaco owned the land in certain places and that petitioner stressed to stay off of the Texaco land as well as the government land in the area, again showing the cutter the flags on the property. RR.V-21-22. He testified that his crew sawed trees well away from each other to avoid killing each other, at a distance where they cannot see each other. RR.V-24. He testified that he did not believe he had crossed the boundary line of petitioner's property, but it is possible some of his hands did. RR.V-25. In summarizing the gravamen of this entire lawsuit he testified, as reflected at RR.V-26:

"Q. [Petittioner]: When was the first time you even knew there was a problem out there with what had happened?

A. [Logger Gary Marshall]: The day that Texaco representative showed up.

Q. Did you feel like you, even when they showed up out there, you were cutting in the correct place?

A. I felt like I was but, you know – we was just cutting where we was told, we thought.

Q. If some of your hands got across, Mr. Harris didn't tell you to get across?

A. No, sir, he didn't.

Q. If they got across, was it a mistake?

A. Yes, sir, it was.

Q. A bad mistake?

A. Yes, sir.

Q. I believe you told me if anybody made an error it was your error. It wasn't Mr. Harris', and you're sorry about it?

A. It was my error. It might have been one of my hands, but it was – it would probably be my fault. I was the one he showed the lines to. It was my hands that would have done it.

Q. You got any reason to get up there and say this other than it's the truth?

A. No, I do not."

Upon cross-examination he reiterated that it was a possibility he cut over the line even though he was the saw contractor, the line was flagged and he was told not to cut over it. RR.V-32. In response to the prosecutor's inquiry into how he missed the line he testified there were several different ways to do so and it would be easy. RR.V-37. Again, upon cross-examination he indicated that he knew Texaco owned land in that area from the beginning, but he was under the assumption that he was at the right place and petitioner claimed ownership of the timber that was being cut, further demonstrating petitioner's lack of knowledge that the cutter may have crossed a flagged boundary line. RR.V-38-39. Even when asked by the prosecutor "if anybody is guilty in this case, it's you, right?", the logging cutter Marshall testified that it was a possibility it was him, accepting fault for any possible encroachment. RR.V-39. He testified that he recalled the original statement made by MacGinnis to the effect that petitioner took Marshall to the location and showed him the areas marked with red colored ribbon to be the correct facts despite MacGinnis' conflicting testimony

regarding the flagging. RR.V-40-41. He detailed how a tree top may fall or a skidder may run over a ribbon, explaining how he could have inadvertently crossed the line. RR.V-41.

Petitioner thereafter testified upon his own behalf describing his experience in the timber business and his previous efforts to buy any Texaco property located in Texas. RR.V-43. Petitioner testified, and introduced documentary evidence, indicating his ownership in the tracts that were marked at his direction by Hussey. RR.V-44. He also introduced evidence indicating his payment to Dubose Surveying to survey the property prior to the cut, in order that he could purchase the land he owned and cut. RR.V-45-47. He described the hiring of Hussey to flag the property twice and his meeting with Gary Marshall, just as Marshall described. RR.V-47-49. Petitioner testified that he was not the person who apparently highlighted the map in yellow, and that he in fact never gave MacGinnis a map. RR.V-49. Defendant's Exhibit 10 was admitted before the jury to demonstrate the agreement between petitioner and MacGinnis. RR.V-51. Petitioner's testimony and the documentary evidence introduced indicated that petitioner was paid for 58 loads rather than 67 loads that were sold by MacGinnis off of the property. RR.V-52. He additionally indicated that he possibly got paid for one other load, but he still received only the two checks as established by previous testimony. RR.V-53. Petitioner testified that he never believed that anyone was cutting Texaco timber, and if in fact they did he did not get paid for it. RR.V-54. Petitioner testified that he had the property flagged twice, surveyed before the cut, and even surveyed since this court case arose, finding

nothing different from the original survey. RR.V-54. He testified that he did not make a mistake in this situation, and that he was "in the right". RR.V-55. Upon cross-examination, the prosecutor established that petitioner in fact had ownership interest in his property, just as he testified. RR.V-59. Upon cross-examination, the State elicited testimony establishing how petitioner knew that Texaco had previously cut timber on its own property, even listing the names of the persons in charge of the cutting. RR.V-64-67. Again petitioner detailed his efforts to determine the proper lines by surveying and flagging in order to avoid trespassing on any property owned by Texaco. RR.V-69-70. He explained that he dealt with Gary Marshall, the subcontractor to MacGinnis, because he never could get a hold of MacGinnis and that he learned that his performance did not measure up to his credentials. RR.V-71-72. He detailed his meetings with Ables, and his visit to the courthouse with the deputy sheriff to provide him a copy of his deed, as well as his visit to the office of the sheriff. RR.V-73-74. Petitioner testified that he was still of the belief that he cut his own timber, and believed all of the Texaco timber had been previously cut. RR.V-75-76. He testified he knew portions of the Texaco property had been cut because he caught the people cutting it. RR.V-76. He testified to the locations of the boundaries of the property, and his accompanying Hussey when he flagged the property the first time. RR.V-77-78. He explained the fact that he could not admit or deny that Texaco owned the adjacent property, in that he had never done a title search on the Texaco property. RR.V-80. He also told the jury he had no doubt in his mind that MacGinnis had shorted him out of eight loads

of timber. RR.V-80. Upon redirect examination, petitioner described the cordial meeting with Ables, when Ables admitted that he did not even know where he was at by looking at the map at his first visit at the site. RR.V-82. Petitioner additionally produced and introduced correspondence from Texaco requesting that appellant make an offer to purchase properties in Texas, which prompted the letter from him earlier introduced. RR.V-82-84. The State even established through cross-examination that petitioner was a man with 33 years of experience who had the property surveyed twice and flagged twice, and petitioner did not personally make a mistake. RR.V-88. Petitioner additionally testified that he never saw anyone on his behalf on the Texaco property, and it could have been cut before his operation, although he did not know. RR.V-80. Petitioner thereafter rested.

The State recalled MacGinnis who testified that he did not see any flagging as was described by petitioner, Hussey, and Marshall. RR.V-92. While MacGinnis admitted that he was not logging in any other area at the same time as this one, he then claimed it was probable that the mill ticket included loads from some other tract. RR.V-95. MacGinnis claimed that the discrepancy in the amount paid to petitioner was probably due to an amount he paid to another individual for timber off of another cut. RR.V-96-99. MacGinnis claimed that he had never received a letter concerning the matter from an attorney Lynwood Sanders, nor discussed the matter with him concerning the issue over the payments due by him to petitioner. RR.V-102. He claimed the first time he had ever been questioned about petitioner being shorted on payment was at trial. RR.V-104. The State then recalled

Ables to testify that MacGinnis was honest and that petitioner had not produced a deed and a map for Ables, apparently attempting to discredit petitioner and bolster the testimony of MacGinnis. RR.V-109. In response, petitioner called a licensed attorney, Lynwood Sanders, who described Defendant's Exhibit 14, letters to MacGinnis signed for by Melva MacGinnis. RR.V-111-112. He testified that he received a telephone call from Mr. MacGinnis, and that they discussed Huey Harris' demand for full payment. RR.V-113. The second letter indicated that Sanders even thanked MacGinnis for calling him, absolutely discrediting the previous testimony of MacGinnis. RR.V-113. The State thereafter recalled MacGinnis another time to deny he spoke with attorney Sanders. RR.V-117-118. This evidence was detailed before the Court of Appeals and the Texas Court of Criminal Appeals.

The reasons compelling review by this court are several. The decision of the Court of Appeals holding that the evidence was sufficient to establish the intent to commit theft conflicts with decisions of other appellate courts, the same appellate court, and with applicable decisions of this United States Supreme Court. The Court of Appeals has in effect decided an important question of federal law in a manner in conflict with decisions of this Court and the Texas Court of Criminal Appeals. Petitioner complained that the evidence was insufficient to establish intent to commit theft. The Court simply failed to properly address the issue for factual sufficiency. Petitioner complained that the evidence was insufficient to sustain the conviction both legally and factually but the complaints were erroneously dismissed by the Court of

Appeals and the Texas Court of Criminal Appeals. Petitioner initially complained that the evidence was legally insufficient to support the conviction. As detailed in the Statement of the Case hereinabove, there was a legitimate dispute as to the ownership of the timber that was actually cut. No one could actually pinpoint the exact location from which timber had been harvested, and petitioner was not convinced that anyone at his direction had harvested Texaco timber even at the time of trial. This case involved claims for damages against MacGinnis and possible civil claims between Texaco and MacGinnis or petitioner. In a similar situation, a different appellate court reversed a trespass conviction because of the disputes over the entitlement of a defendant to a disputed area in *Hann v. State*, 771 S.W.2d 731 (Tex.App. – Ft.Worth, 1989). The court held that since a bona fide dispute did exist between the appellant and the complainant regarding the appellant's access to the property, it was evident that the accused believed the land to be his, and the trial court therefore found the evidence insufficient to support the conviction. In conflict with that appellate court, the Ninth Court in this case failed to appreciate the dispute and erred in holding that no bona fide dispute existed. The record as set out above is replete with the details of the dispute as to ownership and the actual land upon which timber was cut. On page 3 of the court's opinion, the court recognizes that there may have been a factual dispute over *whether timber was actually cut from Texaco land*, then makes the obvious observation that there was no dispute over *ownership* of Texaco timber. Of course, petitioner recognizes that Texaco owned Texaco's timber. The bona fide dispute was over who owned the timber that

petitioner actually cut. The entire factual case depended on whether any timber was cut from Texaco land at all, and therefore that was exactly the bona fide dispute. In a theft of personalty case, a conviction cannot be upheld if ownership of the property is disputed between the complaining witness and the accused. *Bryant v. State*, 627 S.W.2d 180 (Tex.Cr.App. 1982); *Cox v. State*, 658 S.W.2d 668 (Tex.App. – Dallas, 1983). Of course, when reviewing the legal sufficiency of the evidence, the appellate court must review the evidence in the light most favorable to the jury's verdict and determine if any rational trier of fact could have found the elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In a theft case it is necessary for the State to prove criminal intent in order for the evidence to be legally sufficient, as stated by the court in reversing the conviction in *Weatherby v. State*, 738 S.W.2d 83 (Tex.App. – Eastland 1987). It is this failure of the State's evidence to establish either the gravamen of the offense or the requisite criminal intent that the Court of Appeals did not recognize, in conflict with other courts. While it is well settled that intent to commit theft may be inferred from the surrounding circumstances, a theft conviction resulting from an otherwise civil dispute may warrant reversal for insufficient evidence where there is no evidence supporting the requisite criminal intent, as stated by the appellate court in reversing a theft conviction in *Roper v. State*, 917 S.W.2d 128 (Tex.App. – Ft. Worth 1996). In reversing another similar analogous situation in a criminal trespass case in *Gornick v. State*, 947 S.W.2d 678 (Tex.App. – Texarkana 1997), the appellate court stated at page 680:

> "The gist of the offense of criminal trespass is a purposeful act of trespass on land not one's own. The statute creating the offense does not criminalize acts that are undertaken in good faith as the proper exercise of ownership under a claimed right, for in such a case there is no criminal intent. If a person is acting under a bona fide claim of right, albeit ill-founded, he is not guilty of a crime. If the act is not in fact legally justified, it may constitute a trespass that can be redressed by civil remedies, but it is not a crime."

Identically, petitioner acted under a bona fide claim of right, even if the logger Marshall did accidentally cross a line, and there is no evidence of any criminal intent by petitioner. In fact, the evidence overwhelmingly establishes that his acts were totally inconsistent with the acts of a guilty person. The same Ninth Court of Appeals that failed petitioner herein had recently addressed the sufficiency of the evidence in a theft of timber case, finding the evidence sufficient, however, petitioner pointed out that those facts were far more compelling and distinguishable from the case of petitioner. *Long v. State*, 7 S.W.2d 316 (Tex.App. – Beaumont 1999). In *Long, id.*, the Ninth Court noted that the defendant did not claim any ownership in the timber. To the contrary, petitioner in fact had ownership interest in much of the timber harvested, if not all, since any cut timber belonging to Texaco was cut inadvertently by Marshall. No such facts as in *Long* were adduced in the case *sub judice*, and in fact the evidence overwhelmingly established petitioner's lack of criminal intent.

The conflict with decisions of this Court is also evident from a review of the opinions of Texas' highest criminal court in this area. In an almost identical case on point, a conviction of theft for cutting timber on the land of another was reversed in *Allsup v. State*, 62 S.W. 1062 (Tex.Cr.App. 1901), when there was a significant dispute over the ownership of the land from which the timber was taken. The case turned on the fact that the accused believed the land to be his, vitiating any criminal intent. The Texas Court of Criminal Appeals could have been addressing this very case when it stated at page 1062:

> "It is evident that appellant believed the land to be his, and when the controversy came between himself and Boyd, and when Boyd tore down his fencing, he applied to the county surveyor to settle the disputed boundary between them by identifying the original lines. We are unwilling to sanction this verdict on the testimony before us. White's Ann. Pen. Code, §§ 1423, 1424. The judgment is reversed, and the cause remanded."

Identically, the evidence established beyond dispute that petitioner believed the land to be his, and when a dispute arose, he produced a deed, as well as having the property surveyed a second time. The evidence was therefore legally insufficient to support the conviction, and appellant was entitled to an acquittal under the law pronounced long ago by this Court. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

In the alternative but not waiving any of the above, petitioner raised before the Court of Appeals, Court of Criminal Appeals, and still contends that the evidence is

at the very least factually insufficient. The Texas appellate courts failed to afford petitioner due process by failing to properly address the issue and apply Texas law. This reason is based on the same evidence adduced at trial, and similar authorities. Petitioner submits that the totality of the evidence summarized above overwhelmingly established his innocence, and had the Texas appellate courts properly applied Texas law, he would have been entitled to a new trial. Petitioner contends that the evidence adduced at trial so preponderates in his favor as to cry out for a verdict of not guilty, rendering the verdict factually insupportable. While petitioner invites this Court, just as the Ninth Court, to review the entire record in order to adequately address these issues and reasons for review, the evidence detailed above reveals that petitioner in fact owned the tracts in which the logging operation began and operated, that he had the property surveyed prior to purchasing it, that he had the boundary lines flagged in order to mark the line, that he previously had caught persons cutting timber on the adjacent Texaco property in the past, that he again had the property flagged immediately prior to cutting his timber, that he met with the sawman Marshall in order to point out the boundaries, that he instructed him to be certain he stayed off of Texaco or government property in the area, that he at all times expressed the uncontroverted belief that he was cutting timber only on property that he owned, and that apparently Gary Marshall and his crew may have inadvertently cut timber across the line off of Texaco property. Such evidence establishes absolute civil liability for the inadvertent actions of his agent, as well as absolute innocence of any criminal act in the absence of any

mens rea or criminal intent upon his part. The actions of petitioner throughout the entire transaction were far more consistent with the actions of an innocent person, rather than a thief. The verdict of guilt is therefore manifestly unjust, and the Court of Appeals denied petitioner due process by failing to apply Texas law.

It was the duty of the Ninth Court of Appeals to reverse the conviction if the great weight and preponderance of the evidence so weighs against the verdict as to render the verdict clearly wrong or manifestly unjust. *Clewis v. State*, 922 S.W.2d 126 (Tex.Cr.App. 1996). The Texas Court of Criminal Appeals recently reaffirmed the application of *Clewis*, *id.*, and explained the analysis required for factual sufficiency review in *Johnson v. State*, 23 S.W.3d 1 (Tex.Cr.App. 2000), stating:

> "We conclude the Court of Appeals was correct in this respect, and the appropriate scope of the *Clewis* criminal factual sufficiency review does, in fact, encompass both formulations utilized in civil jurisprudence, *i.e.*, that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence. Because the State always carries the burden of proof to establish the elements of a criminal offense at trial, an appellant's points of error challenging the sufficiency of the evidence used to establish the elements of the charged offense could claim that the evidence used to establish the adverse finding was so weak as to be factually insufficient. This is the most equitable approach, especially given the fact criminal

> defendants are not under any obligation to present evidence on their behalf and usually rely, instead, on forcing the State to prove its case beyond a reasonable doubt. Alternatively, in the event a defendant does muster contrary evidence, this standard of review allows him, if he so chooses, to present the argument on appeal that his evidence greatly outweighed the State's evidence to the extent that the contrary finding is clearly wrong and manifestly unjust. We hold, therefore, that our opinion in *Clewis* is to be read as adopting the complete civil factual sufficiency formulation. Borrowing in part from Justice Vance's concurring opinion in *Mata v. State*, 939 S.W.2d 719, 729 (Tex.App. – Waco 1997, no pet.), the complete and correct standard a reviewing court must follow to conduct a Clewis factual sufficiency review of the elements of a criminal offense asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. Adoption of this complete standard allows us to remain true to one of the stated goals of *Clewis*, harmonization, when appropriate, of civil and criminal jurisprudence, and it recognizes the State's burden at a criminal trial is proof beyond a reasonable doubt."

Petitioner met both prongs of this standard of review before the Texas appellate courts, but both courts failed to adequately address the issues or the evidence. The record reveals and petitioner urges that (1) the evidence favoring a conviction is so weak as to be clearly wrong and

manifestly unjust and, (2) because petitioner produced compelling exculpatory evidence negating his knowledge of any wrongdoing and establishing his lack of criminal intent, that the adverse finding is against the great weight and preponderance of the available evidence. All of the acts of petitioner were consistent with the acts of an innocent person. Although not the legal standard, petitioner submits that a litmus test for examining the factual sufficiency should exist when the evidence begs the question of "how in the world did the jury find this man guilty under this evidence?". A guilty party would likely not have insisted that a law enforcement officer meet him at the courthouse so he could show him his deed to the property. A guilty party would likely not have insisted that he owned the timber in the face of a potential owner of the timber, if he had criminal intent. A guilty party would likely not have met with the sheriff of the county to explain his position, and thereafter continue his logging operations, if he possessed the knowledge that he may be harvesting timber not his own. A guilty party would likely not survey property, flag it twice, and instruct the man with the saw to stay off of other persons' property. A guilty party would likely not hire a lawyer to make a claim against the main contractor in charge of the cutting operation for his belief that he shorted him in his payment. A guilty party would likely not have his own property surveyed a second time after being indicted for felony theft to establish his ownership of the timber, if he in fact knew or believed that he did not actually own or harvest his own timber. All of the other credible testimony in evidence overwhelmingly supported petitioner's version of the facts, indicating his lack of criminal intent.

The appellate courts totally failed to apply the *Clewis* standard to this evidence, even failing adequately to address it. The Court of Appeals recounted some of the evidence in the opinion and simply stated that the proof of guilt is not so obviously weak as to undermine confidence in the jury's verdict and is not greatly outweighed by contrary proof. Conspicuously absent is any analysis or basis in the record to substantiate that conclusion. As set out herein, the verdict is in fact manifestly unjust as the evidence of innocence is overwhelming. The case unquestionably should have been a civil dispute over the inadvertent cutting of timber from wrong property, if in fact the timber was cut from Texaco property. *e.g.*, See *Kirby Forest Industries, Inc. v. Dobbs*, 743 S.W.2d 348 (Tex.App. – Beaumont, 1987).

The evidence overwhelmingly established the innocence of petitioner. Under established case law, the evidence was legally insufficient to support the verdict, and therefore a judgment of acquittal should have been entered, under the authorities from this Court. In the alternative, after reviewing *all* the evidence, if an appellate court believed that there was some evidence of criminal intent upon the part of petitioner, which petitioner contends is not supported by the evidence, then the Texas appellate courts were bound by due process to conclude that the evidence so far preponderated against a verdict of guilt that the verdict of the jury was clearly wrong and manifestly unjust. The cause should have been, and must be reversed and remanded for a new trial.

The decision of the Court of Appeals therefore conflicts with the above-cited authorities, and has decided an important question of federal law contrary to existing

authority and which should be resolved by this court. Even if petitioner is not entitled to an acquittal, petitioner is at the very least entitled to a meaningful factual sufficiency review which must result in a new trial. The Court of Appeals failed to address the issues on this basis adequately, thereby denying petitioner the review to which he is entitled by due process.

Not only is the evidence in this cause insufficient to support the conviction, but it overwhelmingly establishes the innocence of petitioner Huey P. Harris. For these reasons, petitioner urges that this Court grant a writ of certiorari to review the opinion of the Court of Appeals, Ninth District of Texas, and refusal of PDR by the Texas Court of Criminal Appeals, and that a judgment of acquittal be entered, or in the alternative that a new trial be granted.

This Court should grant certiorari to determine these issues and to resolve the conflict between the opinion of the Court of Appeals, Ninth District of Texas, and this Court in the various cases relating to said issue.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in this case.

DATED: July 16, 2001

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-99-339 CR

HUEY P. HARRIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 88th District Court
Hardin County, Texas
Trial Cause No. 13,924

OPINION

(Filed Dec. 13, 2000)

Huey P. Harris appeals his conviction by a jury for the offense of theft. The trial court assessed his punishment at two years in state jail, suspended and probated for five years, with a $10,000 fine. Harris was also ordered to pay restitution. On appeal Harris argues in two issues that the evidence is legally and factually insufficient to support the jury's verdict.

We affirm because the evidence is legally and factually sufficient to support the jury's verdict.

Harris contends in his first issue that the evidence is legally insufficient to support the jury's verdict. In evaluating the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Ovalle v. State*, 13 S.W.3d 774, 777 (Tex. Crim. App. 2000).

Douglas Ables, a land representative for Texaco, testified that on October 21, 1996, he received a call informing him that someone might possibly be cutting timber on Texaco land in Hardin County, Texas. According to Ables, when he got at or near the area in question, the first person he talked to was a Mr. MacGinnis. He stated that MacGinnis told him that he was cutting timber for Huey Harris. He said that when MacGinnis said he had no deed showing ownership in Harris, he asked MacGinnis if he had a map. He indicated that MacGinnis produced a map that he said he received from Harris, a map that showed areas marked in yellow that MacGinnis was supposed to cut. Ables mentioned that some of the lots that were marked in yellow belonged to Texaco. He testified that Charles MacGinnis and MacLogging, MacGinnis's company, while working for Harris, cut timber on lots 24, 25, 26, and 27 of the Nancy Fuller Survey. Ables said that those lots belonged to Texaco.

Charles MacGinnis testified that Harris had told him to cut everything in yellow that was on his map. He said that the next day after Ables had appeared at his job site, Ables met with Harris at the site. MacGinnis indicated that subsequently he stopped the work three times, then resumed it after Harris told him to continue. He said that

he hauled away the timber and paid Harris for it. MacGinnis said that according to his map some of the timber that was on the four lots owned by Texaco was cut by his saw hands. He indicated that Texaco had never given him permission to cut there and that Harris had claimed he was the owner of the timber and the land.

Kenneth Parker, a crew chief for a survey team, testified that timber was cut from lots 24, 25, 26, and 27 of the Nancy Fuller survey. He said that when he was there on October 29, 1996, he saw timber that appeared to have been recently cut.

We hold that the evidence is legally sufficient to support the conviction. Harris argues that the evidence is insufficient because there was a bona fide dispute as to the ownership of the timber that was actually cut. While there may have been a factual dispute as to whether any timber was cut from Texaco's land, there was no bona fide dispute as to the ownership of any timber that was cut from Texaco's land. Harris relies on several cases, including *Hann v. State*, 771 S.W.2d 731 (Tex. App. – Fort Worth 1989, no pet.); *Bryant v. State*, 627 S.W.2d 180 (Tex. Crim. App. 1982); *Cox v. State*, 658 S.W.2d 668 (Tex. App. – Dallas 1983, pet. ref'd); *Weatherby v. State*, 738 S.W.2d 83 (Tex. App. – Eastland 1987, pet. ref'd); *Roper v. State*, 917 S.W.2d 128 (Tex. App. – Fort Worth 1996, pet. ref'd); *Gornick v. State*, 947 S.W.2d 678 (Tex. App. – Texarkana 1997); and *Allsup v. State*, 62 S.W. 1062 (Tex. Crim. App. 1901). We have examined all of these cases and find most distinguishable because in each of those cases there was a bona fide dispute as to the ownership of the property that was being stolen. In this case there was no bona fide

dispute as to the ownership of Texaco's land nor the timber that was cut from it.

Two of the cases Harris cites were not determined on the basis of a bona fide dispute as to ownership of property. In *Weatherby,* the court held that the evidence was insufficient to support the jury's verdict in a theft case. *Weatherby,* 738 S.W.2d at 84. Weatherby, a feed lot owner, sold the complainant's cattle, with his consent, and received the proceeds as per the agreement. *Id.* at 85. When the checks from the buyer had cleared and it became time for Weatherby to pay the complainant, his business checking account had become overdrawn. *Id.* Consequently, Weatherby's checks to the complainant were returned marked "Insufficient Funds." *Id.* The State indicated that this was not a theft by check case. *Id.* The court, in holding that the evidence was insufficient, noted that the evidence concerning Weatherby's intent was circumstantial and did not rule out all other reasonable hypotheses shown by the evidence. *Id.* at 86. We do not find this holding to be inconsistent with our holding in this case. Further, we note that circumstantial evidence is no longer insufficient merely because it does not rule out all other reasonable hypotheses. *See Geesa v. State,* 820 S.W.2d 154, 161 (Tex. Crim. App. 1991).

In *Roper,* the complainant had an agreement that Roper would sell some hay on his behalf and pay him the proceeds in cash after the deduction of wages that the complainant might owe Roper. *Roper,* 917 S.W.2d at 131. Roper testified that he thought he had the permission to keep the money until the complainant asked for the extra money, if any, that was not part of the back wages that the complainant owed him. *Id.* The complainant denied

that Roper was entitled to any more than $100 of the $1600 he had received for the hay. *Id.* The court held that this was a civil contract dispute involving a contract, the terms of which were unclear. *Id.* at 132. The court noted that theft convictions that arise from otherwise civil contractual disputes may warrant reversal for insufficient evidence where there is no evidence supporting the requisite criminal intent. *Id.* We find this case distinguishable because the case at bar does not involve a civil contractual dispute between Harris and Texaco. We overrule Harris's contention as presented in issue one.

Harris urges in his second issue that the evidence is factually insufficient to support the jury's verdict. In determining whether the evidence is factually sufficient to support the conviction, we must determine whether a neutral review [sic] all of the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

Gary Spears, an employee of the Hardin County Sheriff's Office, testified that he went out "to the location" in response to a report of alleged illegal timber cutting. He said he requested and was shown a deed that showed partial ownership in Harris of some property in the survey. He indicated that he was not able to determine from looking at Harris's deed whether the property, from which the timber was being cut, was the property described in the deed or some other property, but that it was in the general area.

Billy Tomlinson, who was in the oil field service business and trucking business, testified that he accompanied Douglas Ables out to an area in Saratoga where there was a report of timber cutting on Texaco land. He said that when Harris and Ables had a discussion out on the property, Harris said it was his land and designated which part. He acknowledged that he never saw Harris out on the land with a chain saw. He stated that at no time did Harris acknowledge doing anything wrong. He indicated that Harris told him that he had the property surveyed, but did not tell him that the property was flagged.

Douglas Ables testified that it was possible that there were previous cuttings on Texaco tracts 24, 25, 26, and 27 of the Nancy Fuller Survey, from years ago. He acknowledged that on the day he was on the property he did not see Harris, MacGinnis, or anyone else cutting "on this tract" nor did he see such activity on any later date.

Charles MacGinnis testified that Harris told him that all of Texaco's land had been cleared previously. He related how Harris had taken his lead saw hand, Lynn Marshall, and marked the land or showed him where all the lines were. He indicated that he had walked some of it himself. He stated that there was no big conspiracy between him, Harris, and Lynn Marshall to cut Texaco's timber. He testified that Harris told Texaco that he had the deeds to the land.

Virgil Hussey, Jr., a correctional officer for the Texas Department of Criminal Justice, Institutional Division, who cruises timber on the side, testified that he went out on behalf of Harris to flag the land prior to it being cut.

He said that he saw evidence of a surveyor having been on the property before he got there. He indicated that Harris had told him that he had previously surveyed the land.

Tim Parker, a forestry consultant, showed the jury pictures of some timber that was uncut, as well as some that had been cut years before. He showed pictures that showed flagging on the land. He also spoke of observing flagging when he went to the location two years after the cutting was done. He stated that there was newer flagging than what Texaco's surveyors might have done. He concluded that Virgil Hussey put some of the flagging up, that Hussey had flagged it twice. Parker concluded, based upon Harris's tickets and mill tickets, that Harris had been shorted about eight loads.

Gary Lynn Marshall was part of MacGinnis's crew who was cutting timber. He said he saw flags out on the property. He said that Harris showed him the property lines the first day he went out to the property and met him. He recounted that Harris had told him that Texaco owned some land in certain places, although he did not specify exactly where. Marshall emphasized that Harris stressed that he stay off of Texaco's land and to stay off of the neighboring government land. He stated that to his knowledge his cutters did not go across the property line, but that it was possible that some of his hands did. He indicated that even when Texaco showed up, he thought that he and his crew were cutting in the right place, but that they were cutting where they were told. He testified that no one told him to go down there and cut that timber. He urged that it was easy to miss the property line, but that he could not explain how he and his crew

missed it. He indicated that there was a possibility that it was his fault the timber was cut.

Huey Harris testified that he showed the property lines to Gary Lynn Marshall. He said that he never highlighted a map in yellow and gave it to anyone. He related that he never saw any of his crews on Texaco property. He indicated that if anyone cut timber on Texaco property that he did not get paid for it. He stated that every time he talked to Texaco he was in the right. Harris testified that part of Texaco's land had previously been clear cut, but that he was not saying that all of it was. He acknowledged that he did not know if somebody cut over some lines. He also said that he was cutting his own timber, that he still believed that he was cutting his own timber. He indicated that he knew the boundary between his property and Texaco's.

We conclude that the evidence is factually sufficient to support the verdict because the proof of guilt is not so obviously weak as to undermine confidence in the jury's determination, and the proof of guilt is not greatly outweighed by contrary proof. We overrule Harris's contention contained in issue two.

The judgment is AFFIRMED.

JOHN HILL[1]
Justice

Submitted on August 31, 2000

[1] The Honorable John Hill, sitting by assignment pursuant to Tex. Gov't Code Ann. § 74.003(b) (Vernon 1998).

Opinion Delivered December 13, 2000
Publish

Before Walker, C.J., Burgess and Hill, JJ.

APPENDIX B

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN TEXAS 78711

April 18, 2001
COA#: 09-99-00339-CR
RE: Case No. 0205-01
STYLE: HARRIS, HUEY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.